No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF

RICHARD J. SCHREIBER
Vice President
and General Counsel
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76102

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC
RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioners

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

RONALD A. LANE
General Attorney
SANTA FE SOUTHERN
PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
General Attorney
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

February 9, 1987

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

The central issue in this case is whether Congress intended to permit railway unions to expand the focus of local disputes by directing secondary picketing against any rail carrier in the country—even those carriers geographically remote from and totally uninvolved in the primary dispute—when it enacted the Railway Labor Act of 1926 ("RLA"), 45 U.S.C. § 151 *et seq.* In deciding this issue in respondents' favor, the court of appeals rejected *any* analysis of the congressional purposes underlying the RLA on the ground that Congress' "goal" in enacting the RLA "is not itself a rule of law" (Pet. App. 14a), even though that goal is codified in the Act. 45 U.S.C. § 151a.

Remarkably, respondents have made absolutely no effort to defend this critical aspect of the court of appeals' decision. Instead, relying largely on selective passages of the legislative history underlying the Clayton Anti-Trust Act, 15 U.S.C. § 12, *et seq.*, respondents argue that secondary boycotts were lawful at the time the RLA was passed and that in enacting the RLA—the legislative history of which respondents almost totally ignore—Congress intended to leave unregulated "all forms of peaceful secondary picketing." Resp. Br. 47.

As demonstrated below, this argument is belied by a review of the pertinent legislative history. Indeed, even the court of appeals concluded that "[n]o doubt th[e] law [in force in 1926] forbade secondary picketing." Pet. App. 13a. Most fundamentally, respondents' argument that *all* forms of secondary pressure by railway unions are lawful under the RLA is flatly inconsistent with Congress' intent in enacting that statute. Respondents do not and cannot explain how Congress—which was expressly concerned in 1926 with preventing potentially devastating nationwide rail strikes—could at the same time have intended to permit secondary picketing to shut down the nation's entire rail system whenever a local single-carrier dispute is not resolved under the RLA's procedures. Nor can respondents explain why the single industry in which Congress was most concerned about the devastating effects of strikes on the national economy would be the *only* one, together with the airline industry, in which pure secondary picketing is allowed. The reason is clear—Congress did not intend to permit respondents to picket neutral carriers and the court of appeals erred in holding that this picketing cannot be enjoined.

1. Respondents primarily argue that the plain language of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, precludes the federal courts from enjoining any secondary picketing against the nation's railroads (Resp. Br. 9-14), and that this Court has recognized that Norris-LaGuardia can preclude the entry of injunctive relief in railway labor disputes. Resp. Br. 25-32. These arguments are, however, largely irrelevant to the proper resolution of this case. Despite the breadth of the language of Norris-LaGuardia, this Court has consistently held that its literal terms must be accommodated with the underlying policies of the RLA and that, notwithstanding Norris-LaGuardia, an injunction may issue to enjoin conduct found to be contrary to the RLA's purposes.[1]

In *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957), the Court enjoined the union from striking over minor disputes that were pending before the National Railroad Adjustment Board, despite the absence of an express prohibition of such self-help in the RLA, because to have permitted such conduct would have been inconsistent with the basic purpose of that Act:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable." 353 U.S. at 40.

Similarly, in *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 582 and n.17 (1971), the Court held that "the congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting federal courts to enjoin strikes in viola-

---

[1] Respondents have not cited a single case, and we are not aware of any, in which this Court has applied Norris-LaGuardia to preclude entry of injunctive relief in a labor dispute involving conduct —such as the secondary picketing threatened here—that violated the RLA. *See* Resp. Br. 25-27 relying upon *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960); *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365 (1960).

tion of the Railway Labor Act in appropriate cases").[2] See also *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 772 (1961) ("We have held that the [Norris-LaGuardia] Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act").

In light of these decisions, the issue here is not whether Norris-LaGuardia should be broadly interpreted or whether it can ever be applied to a railway labor controversy. No one disputes those propositions, but they do not resolve this case. Rather, the issues presented here are (1) whether, in enacting the RLA, Congress intended to permit *all* forms of secondary pressure against any rail carriers, even those having no connection to the primary labor dispute; (2) whether the underlying policies of the RLA are relevant to a judicial determination of the first issue and (3) whether, in enacting Norris-LaGuardia, Congress intended to preclude the entry of injunctions to enforce the RLA's mandates. To its credit, BMWE does not attempt to support the court of appeals' view (which is indeed unsupportable) that in interpreting the mandates of the RLA a court must not consider the policy of the RLA because Congress' "goal" is "not itself a rule of law."[3]

---

[2] In *Chicago v. N.W. Ry.*, the Court concluded that RLA Section 2 First creates an enforceable legal obligation to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, despite the absence of specific words defining reasonable efforts in that Act. The Court's decision thus completely undercuts respondents' assertion (Resp. Br. 35-36) that the RLA need not be accommodated unless a specific provision of that Act has been clearly and definitively violated.

[3] As petitioners demonstrated in their opening brief (at 22-27), the court of appeals' view is inconsistent with both the understanding of Congress concerning the judiciary's proper function in fleshing out the RLA's provisions and a long line of decisions in which this Court has looked to the policies and purposes of the Act in formulating specific rules of conduct for rail unions and carriers. Thus, for example, the court of appeals' decision is squarely at odds with this Court's decisions in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944) and *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. at 577. In *Chicago & N.W. Ry.*, the Court quoted the statement of the labor spokesman who testified with respect to the RLA:

> "[The RLA] has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

Because the RLA resulted from an agreement between management and labor, this Court has recognized "that statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." 402 U.S. at 576. Moreover, the view that legislative intent can be ignored is also contradicted by Justice Holmes' observation, "it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941), quoting *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908).

2.a. With respect to the two issues they do address, the thrust of respondents' argument is as follows. In enacting the Clayton Act in 1914, Congress intended to immunize secondary picketing by rail unions from federal court injunctions (Resp. Br. 15-20) and that Congress did nothing to change this situation in 1926 when it enacted the RLA. *Id.* at 37-48. Finally, respondents assert that, when Congress passed Norris-LaGuardia in 1932, it intended to remove any doubt concerning the legality of secondary picketing by rail unions. *Id.* at 20-37. Respondents' arguments wholly mischaracterize the legality of secondary picketing by railway unions during the first third of this century and largely ignore the legislative history of the most important of the relevant statutes—the RLA.

No one disputes the fact that during the 1890's federal courts consistently held the use of the secondary boycott to be unlawful when directed against the nation's railroads.[4] In *Thomas* v. *Cincinnati N.O. & T.P. Ry.*, 62 F. 803, 819 (S.D. Ohio 1894), Judge Taft described the illegality of secondary boycotts aimed at railroads in no uncertain terms:

> "Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England."

Contrary to respondents' assertions (Resp. Br. 15-20), the enactment in 1914 of the Clayton Anti-Trust Act, 15 U.S.C. § 12, *et seq.*, did not change the law concerning secondary boycotts generally, much less in the railroad industry. As Congressman Webb, the spokesman of the House Committee that drafted the bill, explained, "[the bill] was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does." 51 Cong. Rec. 9652 (1914). Congressman Webb was so certain of this interpretation that he argued against a proposed amendment, which would have exempted the secondary boycott from the limitations on injunctive relief in the bill, as "not necessary." *Id.* at 9653. He later explained his opposition to the proposed amendment:

> "I should vote for the amendment offered by the gentleman from Minnesota if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the

[4] *See, e.g., Toledo A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *Toledo A.A. & N. M. Ry.* v. *Pennsylvania Co.*, 54 F. 746, 753 (N.D. Ohio), *app. dism'd sub nom., In re Lennon*, 150 U.S. 393 (1893); *Thomas* v. *Cincinnati N.O. & T. P. Ry.*, 62 F. 803 (S.D. Ohio 1894); *Southern Cal. Ry.* v. *Rutherford*, 62 F. 796, 797 (S.D. Cal. 1894); *United States* v. *Debs*, 64 F. 724 (N.D. Ill. 1894), *pet. for writ of habeas corpus denied sub nom., In re Debs*, 158 U.S. 564 (1895).

> secondary boycott and he could not torture it into any such meaning . . .
>
> "I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute." *Id.* at 9658.[5]

[5] In support of their claim that the Clayton Act immunized secondary boycotts from federal court injunctions and overruled the federal court decisions of the 1890's enjoining secondary picketing in the railroad industry, respondents cite the remarks of Senator Borah. Resp. Br. 17, 18 n.16. However, the legislative history makes it clear that Senator Borah believed that secondary boycotts should be, and in fact were, unlawful in 1914:

> "[W]e are asked by some to declare that the labor unions may go further [than act against the primary employer] and affirmatively and effectively and with design interfere with or restrain interstate commerce; that while we condemn all other interests and punish if they restrain trade . . . we will except labor unions. This, Mr. President, I can not do . . . .

51 Cong. Rec. 13925 (1914).

Respondents also cite (Resp. Br. 18) the remarks of Senator Ashurst, who listed *Toledo A.A. & N.M. Ry.* v. *Pennsylvania Co., supra*, and *Thomas* v. *Cincinnati, N.O. & T.P. Ry., supra*, as two cases that he apparently believed should be overturned legislatively. What respondents fail to point out is that Senator Ashurst cited over 100 such decisions. 51 Cong. Rec. 13664-666 (1914). The more relevant evidence of legislative intent comes from Congressman Clayton who cited a number of "recognized authorities" that he believed to be *consistent with* the activity permitted under Section 20 of the Clayton Act. Among the cases cited by Congressman Clayton was Judge Taft's opinion in *Toledo A.A. & N.M. Ry.* v. *Pennsylvania Co., supra*, which held that the refusal of union employees of carriers connecting with the primary employer to handle that line's traffic was enjoinable as a violation of the duty to provide service to the struck carrier under the Interstate Commerce Act. *See* H.R. Rep. No. 627, pt. 1, 63d Cong., 2d Sess. 34 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 30 (1914). Accord-

Congressman Webb's statement that the Clayton Act was not intended to legitimate the secondary boycott was expressly relied upon by this Court in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 475-477 (1921), when it held a secondary boycott to be violative of the antitrust laws, notwithstanding the Clayton Act.[6] Although Congress may have later intended to reverse the holding of *Duplex Printing* in passing the Norris-LaGuardia Act *in 1932*, this does not change the fact that, at the time of the passage of the RLA *in 1926*, secondary boycotts of rail carriers had clearly and consistently been held to be unlawful. Indeed, respondents have not cited even a single case in which secondary picketing was permitted *in any industry* prior to the enactment of Norris-LaGuardia.[7]

---

ingly, Congress did not intend to overrule Judge Taft's decision when it adopted the Clayton Act.

[6] Reviewing the legislative history of the Clayton Act less than seven years after its enactment, this Court found (254 U.S. at 477):

> "[I]t was the opinion of the committee that [the Clayton Act] did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added."

[7] Respondents have also been unable to point to even a single case prior to 1986 in which any court upheld the right of a railway union to direct secondary picketing at wholly neutral carriers. Respondents attempt to justify this gap by arguing (Resp. Br. 41-42) that between 1926 and 1932 the RLA was successful in preventing all but two rail strikes. This argument is unfounded. In the 60 years since the RLA was enacted there have been over 470 railroad strikes. Cullen, "Strike Experience Under the Railway Labor Act," in

Respondents imply (Resp. Br. 15) that, at the time Congress considered the RLA, there was a sharp division among the states over the legality of secondary boycotts. However, the very source cited by BMWE makes clear that even four years later, in 1930, secondary boycotts were almost universally condemned:

> "The forms of pressure usually characterized as 'the secondary boycott'—a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A—have been condemned by the federal and the Massachusetts courts in a series of instances revealing a great range of versatility. Whether the means of pressure upon a third person be a threat of strike against him, a refusal to work on material of non-union manufacture, an unfair list backed by the show of concerted action and force of numbers, coercion and intimidating measures generally, or merely notice by circularization, banners or publication—the ban of illegality has fallen upon all alike."

F. Frankfurter and N. Greene, THE LABOR INJUNCTION 43 (MacMillan 1930).[8]

In sum, at the time of the RLA's passage, Congress could only have understood that secondary pressure tac-

---

Rehmus, *The Railway Labor Act at Fifty*, 197 (1977). The fact that, despite this volume of primary strike activity, prior to 1986 *no court* had ever upheld the right of a railroad union to engage in secondary picketing against wholly neutral carriers, wholly belies respondents' claim that Congress intended to permit such activity.

[8] In support of its argument that all forms of secondary pressure were widely used *and accepted as lawful*, respondents also repeatedly quote from S. Stromquist, A GENERATION OF BOOMERS (Univ. of Illinois Press 1986) (Galley proofs). *See* Resp. Br. 40-41 and nn. 30, 31, and 34. However, this source makes plain that, as of 1895, "[a]ny labor dispute that involved interstate commerce or the mails—and what railroad strike would not—could be enjoined, and the injunction could be enforced by the full, armed might of the United States if not obeyed." *Id.* at 259.

tics were uniformly declared unlawful by the courts. As petitioners explained in their opening brief (at 10-22), the structure, purpose and legislative history of the RLA demonstrate that Congress passed that Act "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. § 151a). This purpose is wholly inconsistent with the view that Congress, in enacting the RLA, in particular Section 2 First, could have intended to permit a railway union to expand the scope of a localized dispute by engaging in secondary picketing across the country in an effort to shut down the nation's rail system. See also Brief of *Amicus Curiae* The National Railway Labor Conference at 12-16, 26-29 (demonstrating how expansion of local disputes into national railway controversies undermines the structure of labor relations developed in the railroad industry under the RLA).

Respondents have cited nothing in the text of the RLA or its legislative history which would justify a result so clearly contrary to the congressional purpose in enacting the RLA. Respondents baldly assert that, because "the Railway Labor Act did not create the right to self-help, there was no need for that law to define its parameters." Resp. Br. 38. This argument, however, conflicts with this Court's decision in *Brotherhood of Railway & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 247 (1966), in which the Court invoked "the spirit of the Railway Labor Act" in carefully circumscribing the extent of self-help available to a struck carrier in order to prevent "labor-management relations [from] revert[ing] to the jungle."

Contrary to respondents' arguments, Congress' failure to insert an express prohibition against secondary picketing in the RLA is no evidence of Congress' intent suddenly in 1926 to authorize all forms of secondary pressure which were clearly unlawful up to that time. The fact is that Congress did not expressly legitimate the secondary boycott as a weapon that rail labor could

permissibly use in the limited circumstance where self-help was authorized under the RLA.[9] Accordingly, Congress did not intend to authorize rail labor to enhance its bargaining leverage in a local dispute by engaging in secondary picketing against wholly neutral carriers in order to bring the country's rail service to a halt.[10] The

[9] Indeed, because the *status quo* obligations created by the RLA with respect to major disputes are applicable only to the parties to such disputes (*i.e.*, the primary employer and its employees), any right to self-help authorized under the RLA once the *status quo* ceases to apply is restricted to self-help between the parties to the dispute. *See* Brief of *Amicus Curiae* The National Railway Labor Conference at 23-24.

[10] In attempting to reconcile its view that all forms of secondary pressure by rail unions are lawful with the clear congressional intent underlying the RLA to minimize interference with interstate commerce, respondents point (Resp. Br. 48) to the fact that under Section 10 of the RLA the President can appoint an emergency board to investigate and report concerning a dispute that could "threaten substantially to interrupt interstate commerce." 45 U.S.C. § 160. Alternatively, respondents suggest that "Congress always has the power to deal with whatever public emergency may be created." Resp. Br. 48. However, the fact that Congress can legislate in an area does not provide a basis for a court to ignore Congress' intent in enacting legislation already in effect. Moreover, the fact that under Section 10 of the RLA the President can appoint an emergency board with respect to a dispute threatening essential transportation plainly does *not* reflect endorsement of secondary pressure that is calculated to "shut down the nation's railroad system." Pet. App. 5a. Indeed, the RLA's drafters anticipated that it should be seldom, if ever, necessary for the President to exercise the power conferred upon him to appoint an emergency board." H.R. Rep. No. 328, 69th Cong., 1st Sess. 4 (1926). This expectation is plainly inconsistent with a view that any local dispute can be expanded into a national crisis by means of secondary picketing.

Respondents also claim (Resp. Br. 49) that if petitioners' view of the law is upheld an anomaly would be created insofar as railroading would be the only industry in which private parties (as opposed to the National Labor Relations Board) could seek a federal court injunction against secondary picketing. But, under either interpretation of the RLA, there will be an anomaly created; the one created by petitioners' interpretation, however is fully consistent with the very special position the rail industry and rail-

court of appeals' decision, instead of strictly construing the RLA, extends to the unions a right which for sixty years they did not enjoy.

2.b. A contrary conclusion is not supported by this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Respondents argue that the decision is not limited to the issue of whether state courts should be permitted to apply state law in prohibiting self-help activities by rail labor unions, but instead stands for the broad proposition that "*all* forms of peaceful secondary picketing are lawful methods of self-help in a Railway Labor Act dispute." Resp. Br. 47 (emphasis supplied).[11] As petitioners ex-

---

way labor legislation have historically enjoyed in this country because of the national interest in the uninterrupted flow of interstate commerce. *See* Pet. Br. 23. Precisely because of that special position, this Court has repeatedly recognized that railroads and airlines may seek injunctions to enforce the RLA and that the Norris-LaGuardia Act must accommodate such actions.

Moreover, the anomaly created by respondents' interpretation of the RLA is wholly at odds with this Court's statement that the RLA should be interpreted consistently with the dictates of the National Labor Relations Act. Pet. Br. 30 and cases cited therein. Respondents do not dispute that their proposed picketing would unquestionably violate Section 8(b)(4), if they were representing employees in any other industry, except the airlines industry. 29 U.S.C. § 158(b)(4).

[11] Respondents' (Resp. Br. 46-47) and the court of appeals' (Pet. App. 16a) effort to interpret *Jacksonville Terminal* more broadly because of the "type of preemption" analysis employed there is misguided. The "type" of preemption to which they refer relates to the unique preemption doctrines under the NLRA which are inextricably linked to facets of that statute which are completely irrelevant to the RLA. Preemption analysis under the NLRA is significantly affected by the fact that there is an administrative agency to interpret that Act and that Congress under the NLRA "has been rather specific when it has come to outlaw particular economic weapons." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 143 (1976), quoting *NLRB* v. *Insurance Agents, International Union*, 361 U.S. 477, 498 (1960). *See San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The RLA's statutory scheme is fundamentally different. No agency

plained in their opening brief (at 35-39), such a holding would have gone well beyond the narrow question before the Court in that case and well beyond the common situs picketing involved in that (but not this) case. Moreover, it is not what the Court in that case in fact held.[12]

Further, respondents' argument that every member of this Court believed in 1969 that *all* forms of secondary picketing are permissible under the RLA is flatly belied by the fact that three years earlier four members of the Court voted to overturn the decision in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966), and thus would have *granted* an injunction under federal law against the picketing of a carrier

---

administers the Act and self-help measures are not defined. *See Jacksonville Terminal*, 394 U.S. at 391 (RLA "is wholly inexplicit as to the scope of allowable self-help").

In *Jacksonville Terminal* the only issue was whether permitting state courts to enjoin rail union picketing would interfere with Congress' objectives under the RLA, which is a traditional preemption question. *See Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Because the Court found that defining secondary picketing is an inherently difficult task, and one that could lead state courts to enjoin conduct Congress clearly did not intend to prohibit, the Court held that state courts were preempted from issuing injunctions. As the Court itself explicitly stated, "the potentials for conflict . . . and for the imposition of inconsistent state obligations, . . . are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic self-help that party may or may not pursue." 394 U.S. at 381 (citations omitted). Nothing in that analysis required the Court to hold that all secondary activities are unlawful. To the contrary, the discussion of the complexity of deciding what is secondary picketing implicitly assumed that some secondary picketing must be unlawful.

[12] The Court's summary of its holding clearly shows that it carefully avoided deciding issues beyond those necessary to the disposition of the case. "We have thus far concluded that . . . it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited." 394 U.S. at 390 (emphasis in original). If the Court had intended to reach the issue whether *all* secondary picketing was *permitted*, it surely would have said so.

that was partially-owned by the primary employer and that provided services constituting "an integral part of the day-to-day operation of the [primary employer]." 362 F.2d at 651. See Pet. Br. 35 n.40.

It is uncontradicted that Congress' purpose in enacting the RLA was to prevent interruptions to interstate commerce arising from either "major" or "minor" railway labor disputes. Respondents' argument that *all* secondary pressure—including secondary picketing calculated to shut down the nation's railway system—is lawful flies directly in the face of this congressional purpose in enacting the RLA. This Court in *Jacksonville Terminal* did not decide, and indeed said it was not deciding, whether *all* secondary activity was lawful under the RLA. That issue, however, is squarely presented here.[13] The secondary picketing threatened here against wholly neutral common carriers must be held to violate the RLA if Congress' purpose in enacting that statute is to be vindicated.

3.a. Nor is there any merit to respondents' argument that Congress intended the Norris-LaGuardia Act "to apply to *all* labor disputes, including rail disputes, in exactly the same manner." Resp. Br. 23 (emphasis in original). See *Brotherhood of Railroad Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957). There is nothing in the Norris-LaGuardia Act or its history which suggests that it was meant to repeal the RLA or permit local labor disputes to be expanded into nationwide disputes in violation of the RLA. To the contrary, in the congressional debates that led to the Act's passage, several Congressmen expressed concern that the proposed statute might prevent the federal courts from enjoining strikes in the rail industry with disastrous effects on the free flow of interstate commerce. The legislative debate makes clear that Congress understood that the Norris-LaGuardia Act would not permit labor disputes in the railroad industry, to bring interstate commerce to a halt

[13] *See* note 12, *supra*.

because such disputes are governed by, and would be resolved under, the comprehensive provisions of the RLA:

> "Mr. LANKFORD of Virginia . . . Does this make it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?
>
> "Mr. LAGUARDIA: I think the gentleman was a Member of the House in 1926?
>
> "Mr. LANKFORD of Virginia. No.
>
> "Mr. LAGUARDIA. We then passed the railroad labor act and that takes care of the *whole labor situation* pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.
>
> • • •
>
> "Mr. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?
>
> "Mr. LAGUARDIA. Interstate traffic is *entirely covered* in the railroad labor act of 1926." 75 Cong. Rec. 5499 (1932) (emphasis added).

As Representative LaGuardia (one of the principal sponsors of the Act) explained, in response to the expressed concerns of Representative Beck that the proposed bill would permit a rail labor dispute to "paralyze interstate transportation from the Atlantic to the Pacific" (75 Cong. Rec. 5472 (1932)):

> "The bill, I will say to the gentleman from Pennsylvania, in no way repeals the railroad labor act, and three-fourths of the argument of the gentleman from Pennsylvania was directed against interference with transportation in interstate commerce; and the gentleman is a sufficiently good lawyer to know the provisions of the railroad labor act, which was passed in 1926.
>
> "Was it to create fear; was it to create prejudice? I will not charge that to the gentleman from Pennsylvania; but it was most unbecoming for a lawyer of his standing to direct his fire entirely on the interruption of transportation of interstate traffic,

when *there is another law which will take care of that situation.*

"Gentleman, this bill does not—and I can not repeat it too many times—this bill does not prevent the court from restraining any *unlawful act.*" *Id.* at 5478 (emphasis added).

Although a broad amendment was offered by Representative Beck that, among other things, would have expressly permitted courts to enjoin labor disputes that obstruct interstate commerce, Representative LaGuardia urged its rejection because the amendment was unnecessary in light of the RLA and the penal provisions protecting interstate commerce.[14]

"Mr. LAGUARDIA . . . The amendment offered by the gentleman from Pennsylvania brings in the public a purely penal provision for which there is adequate law and which it is not intended to repeal by the provisions of this bill . . . The public is fully protected by penal and other statutes not contemplated to be repealed by this bill."

Following Representative LaGuardia's explanation, the proposed amendment was rejected. *Id.* at 5503.

Thus, the legislative history of the Norris-LaGuardia Act discloses that Congress viewed that Act to be of limited application to the rail industry as a result of the comprehensive provisions of the RLA and the interstate commerce statutes.[15] The congressional debates reflect

---

[14] These penal provisions protecting the free flow of interstate commerce, to which Congressman LaGuardia made reference, had been the basis for the injunctions issued against the secondary boycotts of the railroads in the cases cited in note 4, *supra.*

[15] Respondents argue (Resp. Br. 22) that "the Senate report makes clear by referring to rail labor throughout its report, [that] rail labor was included within the class of persons entitled to invoke the protections of the [Norris-LaGuardia] Act," citing S. Rep. No. 163, 72d Cong., 1st Sess. at 10-12 (1932). However, contrary to the implication created by respondents, the Senate Report only refers to rail labor when it discusses *Texas & N.O.R.R.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U.S. 548 (1930),

Congress' understanding that secondary picketing in the rail industry was already unlawful under the RLA and, hence, could be enjoined under Norris-LaGuardia [16] so as to prevent any interference with interstate commerce.

3.b. Respondents repeatedly argue that petitioners seek to authorize federal courts to "examine the motives for union conduct" (Resp. Br. 29) or the likely efficacy of secondary pressure in particular cases in contravention of Congress' intent in enacting Norris-LaGuardia. Resp. Br. 13, 29-31, 37. This argument completely mischaracterizes the nature of the issue before the Court in this case. Petitioners do not argue that BMWE's threatened secondary picketing should be enjoined because such activity would be ineffective or stems from a miscalculation on respondents' part. Quite to the contrary, it is clear that the ability of a railway union to enlarge the scope of a local dispute and thereby bring the nation's railway system to a halt would greatly enhance the leverage enjoyed by that union. Rather, petitioners submit that, in enacting the RLA, Congress intended to continue the prohibi-

---

in which this Court held enforceable and constitutional the provisions of the RLA guaranteeing railway employees the right of self-organization free from interference, influence or coercion. The Senate Report notes that:

"this right of employees, written into the railway labor act, is the same right which is affirmed . . . . in section 2 [of the Norris-LaGuardia Act] . . . . Therefore, the decision of the Supreme Court . . . sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill . . . ."

S. Rep. No. 163, 72d Cong., 1st Sess. at 11-12 (1932). Thus, far from evidencing any congressional intent somehow to override the RLA in enacting Norris-LaGuardia, the language in the Senate Report merely indicates that Congress was concerned about the constitutionality of self-organization provisions. It therefore looked to identical provisions which the Supreme Court had already held constitutional. It found one in the RLA.

[16] Norris-LaGuardia permits an injunction to issue when the federal court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained." 29 U.S.C. § 107(a).

tion against secondary pressure directed at wholly neutral, and therefore innocent, rail carriers, such as petitioners, and that, in enacting Norris-LaGuardia, Congress did not, intend to emasculate this prohibition.

Contrary to respondents' argument, the application of the RLA in this case does not even remotely call for highly subjective or "free-wheeling judicial interference in labor disputes." Resp. Br. 29. Petitioners carry on no joint operations and maintain no joint facilities with the employers (Maine Central Railroad and Portland Terminal Company). This case involves no mutual aid pact, no strike fund and no common situs picketing—facts which can be determined objectively. This case simply involves a railway union expanding the focus of its pressure nationwide by picketing totally neutral rail carriers in order to enhance its leverage over the struck railroad, the railroad industry and Congress. Such secondary activity directed at wholly neutral railroads merely carrying out their duties as common carriers to interchange traffic (See 49 U.S.C. § 10742) is plainly contrary to Congress' intent in passing both the RLA and Interstate Commerce Act.

Application of the "substantial alignment" doctrine is an objective exercise, which merely requires a court to inquire if the struck carrier receives extraordinary services or other aid (such as strike insurance) from the secondary carrier. If so, then the secondary carrier is not, in fact, a neutral with respect to the labor dispute. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 651 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966). As respondents acknowledge (Resp. Br. 27 n.21), the doctrine is directly analogous to the "ally doctrine" which is routinely applied under the National Labor Relations Act to identify third-party employers against whom picketing or other activity may lawfully be directed. "The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. at 383. Both the "substantial alignment" and "ally" doctrines *preserve* labor's right to picket by permitting such activity to be extended beyond the primary employer when a secondary employer has "joined the fray" and thus, in effect, assumed a role in the primary dispute.

Application of the substantial alignment doctrine is thus wholly consistent with national labor policy. By contrast, as explained in petitioners' opening brief (at 29-35), unlimited secondary picketing against wholly neutral third parties is flatly inconsistent with national labor policy. Significantly, respondents have not argued to the contrary nor explained why Congress could have intended to leave two of the nation's most strike-sensitive industries—the railroads and airlines—as the only ones unprotected from the acknowledged ravages of secondary picketing. That Congress would do so is doubly improbable because the railroad and airline industries are not only the two most strike-sensitive, they are also the two for which Congress has provided their own labor statute specifically for the purpose of reducing the likelihood of strikes in those industries.

There are no facts in this case that could support a holding that any petitioner has aligned itself with Maine Central ("MEC") and Portland Terminal ("PT") so as to make it a primary disputant in the controversy between BMWE and those New England railroads.[17] The

---

[17] Respondents argue that "the Chessie system exercised its discretion since the strike to provide other forms of assistance to the primary disputants' rail system." Resp. Br. 6. This assertion, which conflicts with the findings of the court of appeals (Pet. App. 5a) and the district court (*id.* at 35a-36a), is false for several reasons.

First, as respondents acknowledge (Resp. Br. 6), the Chessie system does not interchange traffic with MEC or PT, but only with the D&H, a sister company that, as the district court found, was not a primary disputant. Pet. App. 36a. No evidence was presented by respondents that any of the Chessie system companies ever provided "assistance" to MEC or PT. *See, e.g.*, Jt. App. 14, 22, 31, 35-36. Second, the record shows, as the district court found, that

activity threatened here—secondary pressure calculated to shut down the nation's railroad system—strikes at the heart of Congress' purpose in enacting the RLA. Accordingly, Norris-LaGuardia should not be held to bar entry of an injunction necessary to vindicate the clear purpose of the RLA.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

"the minimal relationship between B&O/C&O and D&H has, in fact, been curtailed as the strike of MEC/PT progressed." Pet. App. 36a. The Chessie system ceased providing D&H with locomotives under a long-established run-through agreement because of the strike. Jt. App. 15-16. It also ceased providing D&H with interchange services at the Buffalo interchange. Jt. App. 21-22. On one occasion, five locomotives were provided to D&H to resolve an emergency situation caused by congestion in the B&O Philadelphia yard. Jt. App. 17-18. No additional locomotives were provided D&H after that one instance. Jt. App. 20. Third, the record shows that the Chessie system refused requests that it received from representatives of MEC/PT to provide the names of furloughed Chessie employees. Jt. App. 33-34. Thus, there is no factual basis for claiming that the Chessie system enmeshed itself in the MEC/PT dispute with BMWE or could be characterized as substantially aligned with or an ally of the primary disputants.

Respectfully submitted,

RICHARD J. SCHREIBER
Vice President
and General Counsel
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76102

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC
RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

RONALD A. LANE
General Attorney
SANTA FE SOUTHERN
PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
General Attorney
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Petitioners

February 9, 1987

* Counsel of Record